



# U.S. Army Corps of Engineers Regulatory Program

Tribal Consultation & Coordination

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## The US Army Corps of Engineers (USACE) Works in Every State



Dworshak Dam, Idaho  
Civil Works Program, Walla Walla District

## Regulatory Program Overview



Sauvie Island, Oregon  
Regulatory Program, Portland District

The Corps has regulated activities by others in navigable waterways through the granting of permits since passage of the Rivers & Harbors Act of 1899 (RHA). The passage of the Clean Water Act in 1972 (CWA) greatly broadened this role by giving the Corps authority over dredging and filling activities affecting "waters of the United States," including many wetlands.

### MOST COMMONLY USED LEGAL AUTHORITIES

- Section 10 of the Rivers and Harbors Act of 1899 involves work and/or the placement of structures in waters of the United States that may affect navigation or navigable water bodies.
- Section 404 of the Clean Water Act, the most common authority, involves the discharge of dredged or fill material into waters of the United States, including some wetlands.

## The Regulatory Program

### Individual Permits

The Individual Permit process is designed to evaluate larger projects that have the potential to impact a



greater number or variety of resources. The Individual Permit process may also be used when there is known controversy surrounding a proposed activity. They take the most time, require public involvement, and are the most similar to pure National Environmental Policy Act (NEPA) actions used in Civil Works Planning projects.

33 CFR 325 specifies timelines for completing permit evaluations and making permit decisions. The Office of Management & Budget has established performance measures for the Regulatory Program in this regard, the Corps makes every effort to comply fully with all environmental laws, regulations and policies. The Corps relies on a professional staff of various academic and field backgrounds and has been successful in forging cooperative relationships to ease information sharing, impact assessments and implementation of mitigation activities.

### General Permits & Nationwide Permits

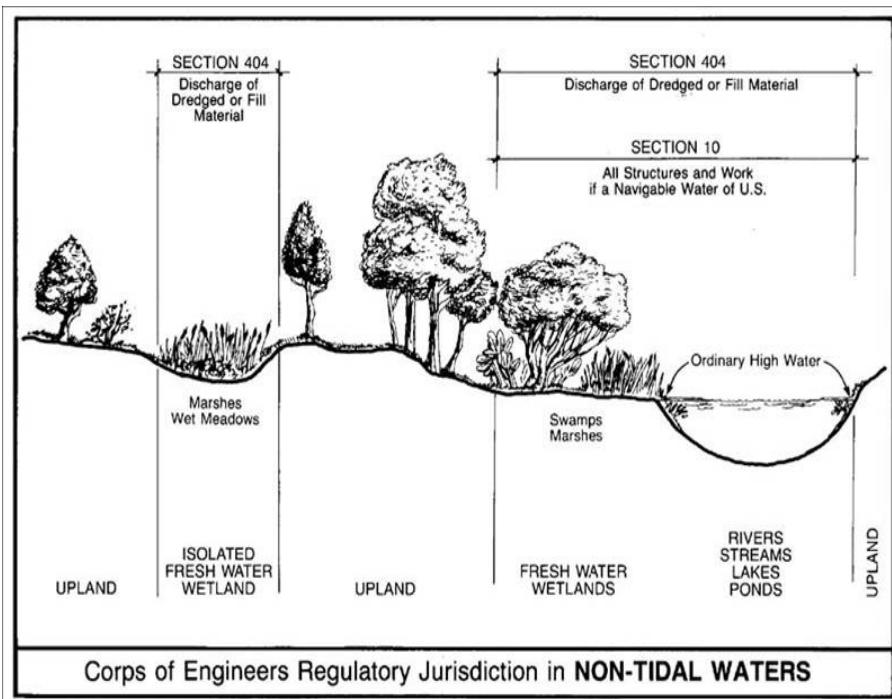
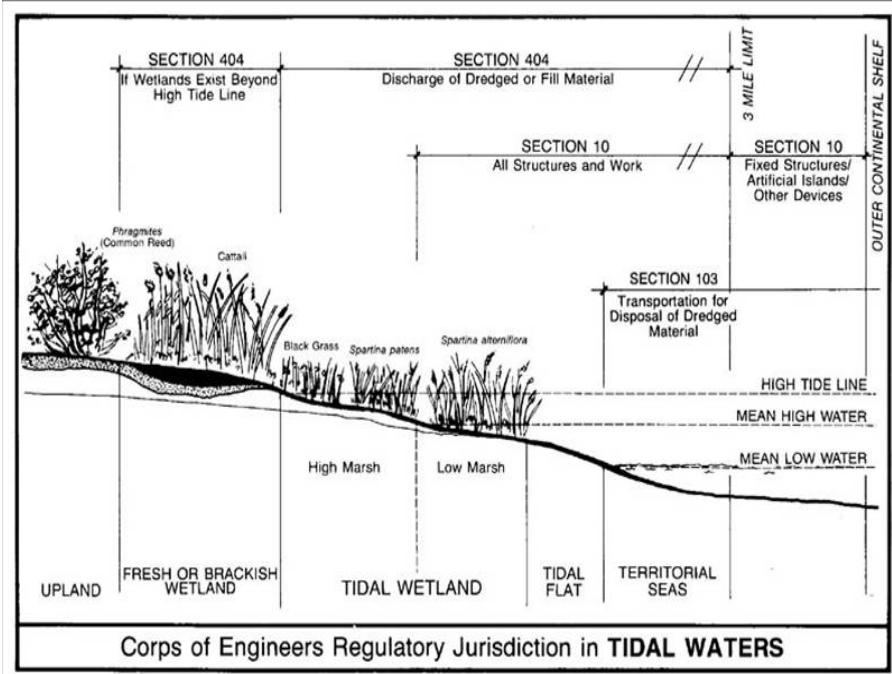
Congress authorized the development and use of general permits (GPs) for categories of activities that are similar in nature and have no more than minimal impacts on the natural and cultural environment. GPs authorize about 80% of the 100,000 annual authorizations issued by the Corps. Nationwide permits (NWPs) are the most common and least complex form of GP authorization. This program allows economic development to move forward, while meeting environmental protection requirements-conditions must be met concerning historic properties & Tribal issues before a GP can be issued.

## Key Points about the Regulatory Program

- The 100,000+ authorizations granted annually occur on private land or land controlled by other government agencies, providing unique environmental protection challenges since the Corps does not control the land or its resources. Projects are wholly funded by the applicant.
- Regulators strive to complete permit reviews within 45 and 120 days.
- Relationships are important—Corps regulators spend up to 90% of their time interfacing with Tribal governments, stakeholders, and the general public.
- Regulatory staff can answer questions about the Program, how it interfaces with environmental statutes, and how resource protection can be achieved. Less than 1% of all permits are elevated beyond the District level due to controversy over historic properties.
- All Corps Districts have designated Tribal Liaisons, or POCs, to assist Tribal Nations. They are supported by the six USACE Tribal policy principles—sovereignty, government-to-government relationships, Trust responsibility, pre-decisional consultation, promotion of economic capacity development and protection of Trust resources whenever possible.
- We require compensatory mitigation for loss of wetlands and waters, only after we have determined that a project has avoided and minimized impacts to the maximum extent practicable.



## Regulatory Jurisdiction



## National Historic Preservation Act (NHPA)

The NHPA states in part:

"The historical & cultural foundations of the Nation should be preserved as a living part of our community life & development in order to give a sense of orientation to the American people."

### Implementing Regulations – 36 C.F.R. 800

This regulation, promulgated August 5, 2004, establishes the procedures for identifying historic properties and determining their significance, assessing impacts as a result of Federal activities, and explains NEPA coordination and tribal consultation requirements. Subpart (b) contains the Section 106 requirements for consultation on Federal actions or 'undertakings.'

#### Section 106

A Federal agency "having direct or indirect jurisdiction" over a proposed Federal undertaking shall, prior to approval of the undertaking, take into account the effect of the undertaking on any historic property "in or eligible for inclusion in the National Register."

#### Federal Undertaking

"Undertaking" means a project, activity, permits, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal Agency, including...

- Those carried out by or on behalf of an agency.
- Those carried out with Federal financial assistance.
- Those requiring a Federal permit, license or approval.
- Those subject to State or local regulations administered pursuant to a delegation or approval by a Federal agency.

## Appendix C (Historic Properties), 33 C.F.R. 325 – Background

The Corps originally implemented Appendix C in 1981 and revised it in 1990 through rulemaking, and uses it today to guide evaluations of projects requiring Department of the Army permits.

The Corps is solely responsible for defining the extent of an undertaking, or "Permit Area", based upon RHA and CWA regulatory scope of jurisdiction and the scope for NEPA review outlined in Appendix B (NEPA Regulations) of 33 CFR 325. At times, historic preservation specialists find themselves in situations where the applicant and the Corps define "Permit Area" in a way that differs from the "Area of Potential Effect (APE)" defined in 36 CFR 800.

A copy of Appendix C can be found at the following website:

<http://www.usace.army.mil/cw/cecwo/reg/33cfr325.htm#appendixC>

## Key Tribal Interests—Appendix C and 36 C.F.R 800

- The “area of potential effect” as defined in 36 CFR 800 and “permit area” as defined under the RHA and the CWA can be applied in ways that define different geographical areas.
- Appendix C does not have the same emphasis on consultation as 36 CFR 800. However, the Corps’ Interim Guidance, dated April 25, 2005, has a section on Tribal consultation based on 36 CFR 800 to draw attention to this very important part of the 106 process.
- Traditional Cultural Properties are indirectly addressed in Appendix C.
- Appendix C does not contain all of the current definitions found in 36 CFR 800.
- Appendix C does not address repatriation of human remains and associated objects that may be encountered in Regulatory actions on private property.
- Appendix C does not address how to conduct consultation on non-reporting permits (NWPs, GPs)



### Whatever replaces Appendix C will:

- Comply with the National Historic Preservation Act;
- Integrate Section 106 review and tribal issues into Regulatory actions; and,
- Enable efficient and timely reviews for over 100,000 permit applications, annually.

## The Appendix C Revision Process

1. *Advance Notice of Proposed Rulemaking* issued in the Federal Register September 27, 2004 ,with copies mailed to all Indian Tribes and Alaska Native Corporations
2. Informal coordination with ACHP began in 2005 and is ongoing
3. Facilitated stakeholder meetings in November 2005 with Water Utility Users Group, National Association of Homebuilders, National Mining Association, Cultural Resource Groups (e.g. ACHP, NASHPO, NATHPO, National Trust for Historic Preservation etc.)
4. Invitation for continued Tribal involvement, Nov 2006– Present
5. Coordination & consultation meetings with Tribes, Summer–early Fall 2007
6. Coordination & consultation with the ACHP and OMB–Winter 2007
7. Conduct follow-up Tribal consultation meetings, upon request
8. Publish Final Rule – Summer 2008

Comments can be submitted by individuals, organizations, agencies, or Tribes at anytime throughout this process.





**US Army Corps  
of Engineers®**

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